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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF SAN FRANCISCO**

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| Southeastern Express Systems, a Georgia partnership, George Barnes, Kevin Clark, and Gerry Wambolt,<br><br>Plaintiffs,<br><br>vs.<br><br>Southern Guaranty Insurance Company of Georgia,<br><br>Defendant. | No. 961044<br><br>COMPLAINT FOR DAMAGES (Bad Faith Insurance and Contract)<br><br>(Filed May 20, 1994) |

Plaintiffs complain of the defendant as follows:

***Parties and Capacities***

1. Southeastern Express Systems ("Southeastern Express") is a general partnership organized under the laws of Georgia. George Barnes ("Barnes"), Kevin Clark ("Clark"), and Gerry Wambolt ("Wambolt") are the general partners of Southeastern Express and residents of

Georgia, and they were at all relevant times officers, agents, and employees of Southeastern Express Systems, Inc.

2. Southern Guaranty Insurance Company of Georgia ("Southern Guaranty") is a corporation organized under the laws of Georgia. Southern Guaranty issues policies of insurance for activities and insured events throughout the United States and, where necessary, defends and provides coverage for insured events that take place in the State of California.

*General Allegations*

3. Southeastern Express is an independent sales and service organization that specializes in sales and service of computers and related equipment made by Triad Systems Corporation ("Triad"). Southeastern Express' headquarters are in Macon, Georgia.

4. Southern Guaranty has insured Southeastern Express and its predecessors and successors with business policies for several years. For a time, Southern Guaranty insured its predecessor George Barnes doing business as Southeastern Brokerage Co. As the insured's business evolved, the insured was changed to Southeastern Express Systems, Inc. Later, the insured became Southeastern Express Systems, a Georgia partnership. These policies cover the business activities of Southeastern Express regardless where they occur in the United States.

5. For the year ended October 25, 1992, Southern Guaranty issued to George Barnes doing business as

Southeastern Brokerage Co. its business policy no. BP09896 and related policy numbers. For the year ended October 25, 1993, Southern Guaranty issued to Southeastern Express Systems, Inc. its business policy no. 00BP0986. A true copy of these two policies ("the Southern Guaranty business policies") is attached to this complaint as Exhibit No. 1. The present Southern Guaranty policy insures Southeastern Express Systems, a partnership. The Southern Guaranty business policies covered Barnes, Clark, and Wambolt as officers, agents, and employees, and later as general partners, of Southeastern Express.

6. The Southern Guaranty business policies insured Southeastern Express, among other things, for "advertising injury," which included (a) an infringement of copyright, title, or slogan, (b) oral or written publication of material that disparaged a person's or organization's goods, products, or services, and (c) oral or written publication of material that violates a person's privacy.

7. In April 1992, Triad sued Southeastern Express, its predecessors, and Barnes, Clark, and Wambolt in the United States District Court for the Northern District of California, No. C92 1539 FMS, in an action entitled *Triad Systems Corporation v. Southeastern Express Co.* ("the Triad federal action").

8. The Triad federal action alleges many facts and claims that fall within the coverage and duty of defense of the Southern Guaranty business policies, including coverage and duty of defense for advertising injury.

9. Essentially, the Triad federal action alleges that Triad owns copyright protection for certain applications,

auxiliary, utility, and diagnostic ("REST") software developed by Triad for its computer hardware, which serves the automotive parts industry.

10. Triad claims that Southeastern Express and Barnes, Clark, and Wambolt infringed Triad's REST and other software copyrights by making and using copies of the software and manuals for the use of the software. Triad claims that this copyright infringement has damaged Triad's business reputation and goodwill and diverted trade and profits from Triad. Triad seeks damages and equitable relief on its claims.

11. Triad's claims fall within the applicable policy periods of the Southern Guaranty business policies.

12. On October 21, 1993, Southeastern Express tendered to Southern Guaranty ("the tender") the defense and coverage of the claims in the Triad federal action under the Southern Guaranty business policies. Prior to the tender, Southeastern Express and the other plaintiffs appropriately and ably defended the Triad federal action through experienced counsel. Southern Guaranty suffered no prejudice under its policies from the filing of the Triad federal action to the tender to Southern Guaranty.

13. Southeastern Express has cooperated fully with requests of Southern Guaranty for information, data, copies of documents, and other materials and disclosures concerning the Triad federal action.

14. Since the tender, Southeastern Express has made several explicit demands on Southern Guaranty for a defense of the Triad federal action. Southeastern Express retained counsel experienced in the issues of the Triad

federal case to defend the case and has incurred to date approximately $1,000,000 in fees and litigation costs to defend the case. These fees and costs continue.

15. Despite repeated demands of Southeastern Express and its cooperation with its insurance carrier, Southern Guaranty refuses to pay the costs of defense of the Triad federal case.

*Charging Allegations*

*Bad Faith Claims Handling*

16. Plaintiffs incorporate here ¶¶ 1 through 15 of this complaint.

17. The refusal of Southern Guaranty to accept the defense of the Triad federal action, to pay currently the costs of defense, and to acknowledge coverage for advertising injury and other insured events under the Southern Guaranty business policies is an intentional refusal by the insurance carrier to pay sums known to be due under its insurance policies and to assure the insureds of coverage that is known to be owed under the policies. Southern Guaranty's actions are therefore in bad faith.

18. Southern Guaranty knows that the plaintiffs have retained experienced and able counsel in the Triad federal action, which means that Southern Guaranty can and has taken advantage of the presence of a proper defense in the Trial [sic] federal action without accepting Southern Guaranty's responsibility to pay currently the costs of that defense. This appropriation by Southern Guaranty of the good faith efforts of the insureds without

compliance with the policy and the duty to defend is bad faith.

19. Southeastern Express and the individual plaintiffs seek in this action their accrued, current, and ongoing costs of defense in the Triad federal action from Southern Guaranty in this action, plus the litigation fees and costs incurred by Southeastern Express and the individual plaintiffs in securing the benefits of the Southern Guaranty business policies by this litigation.

*Breach of Contract*

20. Plaintiffs incorporate here ¶¶ 1 through 15 of this complaint.

21. The failure and refusal of Southern Guaranty to pay currently the costs of defense of the Triad federal action, to acknowledge the duty to defend the action, and to acknowledge the coverage afforded under the Southern Guaranty business policies is in breach of the contracts of insurance on which this action is brought.

22. Plaintiffs have performed all the conditions of the Southern Guaranty business policies that apply to them.

23. As a direct and proximate result of this breach of contract, plaintiffs have suffered damages in the sum of approximately $1,000,000. These damages are continuing and increasing daily.

24. No part of these damages has been paid by Southern Guaranty.

***Prayer***

25. Plaintiffs pray for judgment as follows:

(a) For damages for bad faith and breach of contract according to proof;

(b) For damages consisting of the litigation fees and costs incurred by the plaintiffs in this action to acquire policy benefits denied to them;

(c) For costs of suit; and,

(d) For such other and further relief as shall be made out in the proof at trial of this action.

Dated: May 20, 1994

LAW OFFICES OF
MALCOLM A. MISURACA

By /s/ Malcolm A. Misuraca
Counsel for the Plaintiffs

[Exhibit 1 Omitted In Printing]